

A decorative graphic in the top right corner featuring a white, angular shape that overlaps a portion of a globe showing a map of the Americas.

Antitrust enforcement trends: An update from the 2019 ABA Antitrust Fall Forum Tech Summit

27 November 2019

On 18 November 2019 the American Bar Association's Antitrust Law Section hosted its annual Antitrust Fall Forum. This year, the Fall Forum focused its discussions on a range of issues that could arise from the agencies' ongoing and future investigations into the technology sector – particularly those that focus on "dominant internet platforms." We provide key highlights and insights from the forum below.

Antitrust enforcement against tech platforms

The FTC's new tech division has multiple investigations underway

In February 2019 the U.S. Federal Trade Commission (FTC) announced the launch of a technology task force aiming to focus its resources on U.S. technology markets. On 1 October 2019 the technology task force was formally converted into a division, the Technology Enforcement Division (TED), which further underscored the commission's increased focus on effective antitrust enforcement in the technology sector.

At the summit, FTC Chairman Joe Simons mentioned the factors that led to the creation of TED: (i) the importance of big tech platforms in the economy, (ii) implications for consumer welfare of anticompetitive conduct in the technology sector, and (iii) the complexity of technology markets. "Creating a new section allows us to focus our resources on a very significant priority for the Commission," he added.

According to Simons, in addition to the already publicized investigation into Facebook, TED has "multiple other investigations going on with major platforms." Notably, Simons emphasized the need for additional funding to further support TED's efforts to generate more enforcement actions. "We would double the size of TED, not only in terms of lawyers but also in terms of technologists [if we have more resources]," he said.

FTC may also review consummated mergers in the technology industry

Simons also said that TED's agenda is not only to focus on the conduct side, but also on "consummated mergers," i.e., a single acquisition or a series of acquisitions that have *already* closed. He noted that TED may also investigate allegations of anticompetitive unilateral conduct in conjunction with one or more acquisitions that harmed competition in the aggregate. Other commentators on the panel believed that Section 2 of the Sherman Act could also be considered

as a tool to detect and prohibit a "pattern of acquisitions" by a monopolist if that monopolist was using such acquisitions solely for the purpose of acquiring nascent competitors in adjacent markets in a manner that foreclosed its competitors from establishing a foothold in its market.

DOJ will seek appropriate remedies in digital markets if warranted

The U.S. Department of Justice (DOJ) also confirmed that it is investigating several technology platforms. The DOJ expressed concerns over potential unlawful conduct in digital markets and stressed that it will thoroughly investigate the alleged conduct and seek appropriate remedies where necessary.

Deputy Attorney General Jeffrey Rosen, the keynote speaker, noted that "serious and substantive [antitrust] issues" have been raised about some "leading online platforms." However, he appropriately also cautioned that no conclusion has been reached in these investigations. He further noted that the DOJ will seek appropriate remedies in digital markets "if it is warranted." (Full remarks from Jeffrey Rosen can be accessed [here](#).) On the other hand, Rosen noted that antitrust law is not a "panacea" for every problem, and to provide comprehensive enforcement resources in this area, the DOJ is "keeping in mind other tools in areas such as privacy, consumer protection, and public safety as part of a broader review of online platforms, to whatever extent warranted."

State attorneys general note a concern about network effects and barriers to entry created by big data

Kim Van Winkle, chief of the Antitrust Division at the Texas attorney general's office, discussed the public comments that 43 state attorneys general submitted to the FTC in June 2019 regarding competition issues in digital markets. (The public comments by 43 state attorneys general can be accessed [here](#).) Those public comments included:

- A concern that big data collected by dominant platforms can "entrench their dominance" by causing network effects and barriers to entry.
- The need for renewed antitrust focus on nonprice aspects of competition, including quality, innovation, and privacy.

Other insights from the summit

Various guidelines and commentaries from the FTC's recent hearings are expected to be published

The FTC held a series of public hearings from fall 2018 to spring 2019, including the Hearings on Competition and Consumer Protection in the 21st Century (FTC hearings), to find out whether competition and consumer protection law might be required modifications or adjustments in accordance with the rapidly changing competitive dynamics in certain industries.

Simons previewed the expected outputs from the FTC hearings as follows:

- The FTC is planning to issue a guidance document on "platform competition," in a similar format as the agency's Competitor Collaboration Guidelines, and will do its best to issue it jointly with the DOJ.
- The FTC is also planning to issue a vertical merger commentary similar to what the agency had done in its the 2006 Commentary on the Horizontal Merger Guidelines.
- The FTC is developing an addendum to the 2010 Horizontal Merger Guidelines to deal with unique issues involving acquisitions of nascent competitors and nonprice aspects of competition (e.g., quality, innovation, and potentially privacy).

- The FTC might also publish new vertical merger guidelines, but Simons said he could make "no promises" there.
- The FTC is looking closely at what was produced during the hearings on issues regarding the competitive effects of common ownership. The FTC is also considering doing a study on that topic under its authority from Section 6(b) of the FTC Act.
- The FTC will take "a fresh look" at the consumer welfare standard and its alternatives, and it expects to have some output on that topic.

DOJ will seek to terminate the *Paramount* consent decrees

Assistant Attorney General Makan Delrahim used the summit as an occasion to announce that the DOJ will ask a federal court in the Southern District of New York to terminate its 71-year-old *Paramount* consent decrees. He noted, however, that a two-year sunset period will be set for the bans on "block booking" (i.e., bundling of multiple films) and "circuit dealing" (i.e., single licensing to cover all theatres in a circuit)." The sunset period will allow the defendants and movie theatres a period of transition to adjust to any licensing proposals that seek to change the theatre-by-theatre and film-by-film licensing structure currently mandated by the decrees," he explained. (Full remarks from Makan Delrahim can be accessed [here](#).)

In 1948 the DOJ and several major motion picture companies agreed to the so-called "*Paramount* consent decrees" after several years of litigation. The *Paramount* consent decree defendants were required to divest either of their distribution business or their theatres, and the consent decree prohibited block booking and circuit dealing, among other practices.

Delrahim pointed out changes in the movie industry and technological developments (e.g., multiplex theatres showing films from various distributors and subscription streaming services, such as Netflix) as the primary justifications for DOJ's decision to end the decrees. Nevertheless, the DOJ does not consider the vertical practices that had been prohibited by the *Paramount* decrees to be "per se lawful" and will continue to review them under the rule of reason.

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